

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY CHRISTIAN	:	CIVIL ACTION
	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	
	:	
v.	:	
	:	
PAUL I. BURMAN and JOSEPHINE	:	
BURMAN, his wife, SAUL ASSOCIATES	:	
& VINCENT BARBA	:	NO. 98-2045

MEMORANDUM AND ORDER

HUTTON, J.

NOVEMBER 8, 1999

Presently before the Court are Third-Party Defendant Vincent Barba's Motion to Dismiss the Joinder Complaint of Defendant, the United States of America, Pursuant to F.R.C.P. 12(b)(6) (Docket No. 13) and Defendant's response thereto, Third-Party Defendant Vincent Barba's unopposed Motion for Extension of the Discovery Deadline (Docket No. 15), and Third-Party Defendant Vincent Barba's unopposed Motion to Compel Defense Medical Examination of Plaintiff and for Sanctions (Docket No. 16). For the reasons stated below, Third-Party defendant Vincent Barba's motions are GRANTED in part and DENIED in part.

I. BACKGROUND

The facts and allegations as stated in the Government's Third Party Complaint are as follows. This is a personal injury case

arising from the injuries Gary Christian ("Plaintiff") suffered as a consequence of falling on property allegedly owned by the United States government (the "United States" or the "Government") and operated by the United States Postal Service ("USPS"). Plaintiff alleges that he fell on an uneven and broken sidewalk.

Plaintiff first filed suit against the USPS but later amended his Complaint, naming the United States government as the sole defendant. The United States, as lessee of the property on which Plaintiff allegedly suffered injuries, timely joined Paul and Josephine Burman (collectively, the "Burmans") as third-party defendants, alleging that as the lessors of the property and pursuant to the parties' lease, the Burmans were responsible for repairs to the property.¹

Unknown to the Government at the time it joined the Burmans as third-party defendants, however, was that in 1982 the Burmans sold the property in question to Vincent Barba ("Barba"). The Government discovered the Burmans-Barba transaction after it did additional research on the Burmans' whereabouts when its original attempt at service failed. Once the Government discovered that the Burmans no longer owned the property in question, it filed a Motion for Leave to Amend its Third-party Complaint to join Barba. Said Motion was filed on March 8, 1999 and granted by this Court on March 31, 1999. On April 12, 1999, the Government filed an Amended

¹ In August 1961, the USPS entered a twenty year lease with the Burmans for a post office in Huntingdon Valley, Pennsylvania.

Third-Party Complaint naming Barba as a third-party defendant.

On May 14, 1999, Barba filed the instant Motion to Dismiss the Joinder Complaint of Defendant, the United States of America, Pursuant to F.R.C.P. 12(b)(6). The Government answered Barba's Motion on June 1, 1999. Barba then filed a Motion for the Extension of Discovery Deadline on June 18, 1999, and a Motion to Compel and for Sanctions on August 23, 1999.

As this Court's decision on Barba's Motion to Dismiss potentially is dispositive of Barba's other pending motions, the Court will first consider said Motion.

II. DISCUSSION

A. Legal Standard for Fed. R. Civ. P. 12(b)(6) Motion

"A motion to dismiss pursuant to [Federal Rule of Civil Procedure] 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cir. 1997). That is, a reviewing court must "refrain from granting a dismissal unless it is certain that no relief can be granted under any set of facts which could be proved." Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co., 113 F.3d 405, 412 n.5 (3d Cir. 1997) (quoting Fuentes v. South Hills Cardiology, 946 F.2d 196, 201 (3d Cir. 1991)), cert. denied, 118 S. Ct. 435 (1997). In resolving a Rule 12(b)(6) motion, the

court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case and exhibits attached to the complaint may also be taken into account. Chester County Intermediate Unit v. Pennsylvania Blue Shield, 896 F.2d 808, 812 (3d Cir. 1990). The court's inquiry is directed to whether the allegations constitute a statement of a claim under Federal Rule of Civil Procedure 8(a) and whether the plaintiff has a right to any relief based upon the facts pled. The ultimate "issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683 (1974). Dismissal under Rule 12(b)(6) for failure to state a claim is therefore limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved. Ransom v. Marazzo, 848 F.2d 398, 401 (3d Cir. 1988); Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985), cert. denied, 470 U.S. 935, 106 S. Ct. 267 (1985).

1. Barba's Motion to Dismiss

Federal Rule of Civil Procedure 14(a) provides in pertinent part as follows:

At any time after commencement of the action a defending party, as a third party plaintiff, may cause a summons or Complaint to be served upon a person not a party to the action who is or may be liable to a third party plaintiff . . . The third party plaintiff need not obtain leave to make the

service if the third party plaintiff files the third party complaint not later than 10 days after serving the original answer . . . Otherwise the third party plaintiff must obtain leave on motion upon notice to all parties of the action.

Fed. R. Civ. P. 14(a). Local Rule of Civil Procedure 14.1(a) states as follows:

Applications pursuant to Fed. R. Civ. P. 14 for leave to join additional parties after the expiration of the time limit specified in that rule will ordinarily be denied as untimely unless filed not more than ninety (90) days after service of the moving party's answer. If it is made to appear to the satisfaction of the Court, that the identity of the parties sought to be joined, or the basis for joinder, could not with reasonable diligence have been ascertained within said time period, a brief further extension of time may be granted by the Court in the interest of justice.

Local Civil Rule 14.1(a).

The Government filed its Answer to Plaintiff's Complaint on October 7, 1998 but only sought to join Barba as a third-party defendant on March 8, 1999. Barba correctly explicates that the Government's Motion for Leave to Amend its Third Party Complaint to Join Barba was filed more than ninety days after it filed its Answer to Plaintiff's Complaint. On this basis, Barba argues that because the Government's joinder of him was untimely Rule 14 and Local Rule 14.1(a), the Government's Third-Party Complaint against him should be dismissed.

Barba references the case law that sets forth the standard by which his claim is to be judged. Those cases hold that joinder granted later than ninety days after defendant filed an Answer may be permitted upon a showing that the defendant's tardiness was

excusable, that the third party defendants will not be prejudiced, and that the underlying action will not be unduly delayed or complicated. See, e.g., Darreff v. Raley Downes Services, CIV.A. No. 93-2728, 1995 WL 465544, at *2 (E.D. Pa. Aug. 3, 1995); Thomas v. Stone Container Corp., CIV.A. No. 89-1537, 1990 WL 63738, at *3 (E.D. Pa. May 9, 1990); DiLorenzo v. Saint Agnes Med. Ctr., 103 F.R.D. 546, 547 (E.D. Pa. 1984); Hornsby v. Johns-Mansville Corp., 96 F.R.D. 367, 368 (E.D. Pa. 1982). While the "[t]imeliness of motions is an important consideration which may not be dismissed lightly if the business of the courts is to be prevented from lapsing into chaos," Thomas, 1990 WL 63738, at *3, "it is well settled that the time limits for filing a motion for leave to file a third party complaint are not cast in stone." Hornsby, 96 F.R.D. at 369. Local Rule 14.1(a)'s time limit generally has been treated as a guideline for use by the court in its exercise of discretion and "most courts have placed greater weight on the question of prejudice in determining whether to permit the tardy filing of a third-party complaint." Id. See also Thomas, 1990 WL 63738, at *3.

The Court, in an Order dated March 31, 1999, exercised its discretion to allow the Government to amend its third-party complaint to join Barba as a third-party defendant although the statutory time limit had expired. Now Barba argues that the Government's third-party complaint should be dismissed on the

grounds that the Government's five month delay in motioning for leave to amend was inexcusable, thereby directly implicating as misinformed this Court's discretionary grant of said motion.

Barba fails to show that the Government's tardiness was inexcusable, that he will be prejudiced, or that the underlying action will be unduly delayed or complicated. Indeed, he makes sweeping statements that, when read in light of the facts stated in the Government's Third-Party Complain, provide no basis for relief. Therefore, Barba fails to satisfy his burden. Accordingly, Barba's Motion is denied.

**B. Legal Standard for Consideration of Motion for
Extension of Discovery Deadline**

Under federal Rule of Civil Procedure 16(b), except in actions exempted by the Local Rules which are not applicable in this matter, the Court must issue a scheduling order which limits the time, inter alia, to complete discovery. Fed. R. Civ. P. 16(b)(3). The purpose of a scheduling order is to "advance the case in an orderly and prompt manner in order to secure the just, speedy, and inexpensive disposition of the case as soon as possible under the circumstances." Mines v. City of Philadelphia, CIV.A. No. 93-3052, 1994 WL 376914, at *2, (E.D. Pa. July 18, 1994) (quoting Fox v. S.P. Parks, Inc., CIV.A. No. 853371, 1986 WL 1907, at *2 (E.D. Pa. Feb. 12, 1986)). Under Rule 16(b), a court may modify a Scheduling Order only upon a showing of good cause. Fed. R. Civ. P. 16(b).

To establish good cause, the moving party must demonstrate that a more diligent pursuit of discovery was impossible. McElyea v. Navistar Int'l Trans. Corp., 788 F. Supp. 1366, 1371 (E.D. Pa. 1991).

1. Barba's Motion for Extension of Discovery Deadline

Barba requests that the Court extend its discovery deadline given his late joinder to the instant matter. Barba's request is unopposed by either Plaintiff or the Government.

Barba was served with the Government's Amended Third-Party Complaint on or about April 29, 1999. However, on April 23, 1999, the Court entered a Scheduling Order establishing a discovery deadline of June 21, 1999. Barba sufficiently demonstrates that the three week period between the time he learned that he was named as a third-party defendant in the instant action and the close of discovery made impossible a diligent pursuit of discovery.

In the alternative, as of the date of this Order, Barba's Motion remains unopposed and the Court therefore treats the motion as uncontested pursuant to Rule 7.1(c) of the Local Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania. E.D. Pa. R. Civ. P. 7.1(c). Rule 7.1(c) states that, except for summary judgment motions, "any party opposing the motion shall serve a brief in opposition, together with such answer or other response which may be appropriate, within fourteen (14) days after service of the motion and supporting

brief. In the absence of a timely response, the motion may be granted as uncontested" E.D. Pa. R. Civ. P. 7.1(c). Accordingly, for the reasons stated above, Barba's Motion is granted and the Court will enter shortly hereafter an Amended Scheduling Order.

C. Legal Standard for Motion to Compel

Federal Rule of Civil Procedure 35 provides the framework for the enforcement of discovery requests regarding, inter alia, medical examinations. Rule 35(a) gives a court authority to order one party to comply with the other's legitimate discovery request to submit to a physical examination by a suitably licensed examiner. Fed. R. Civ. P. 35(a). Such an order "may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties" Fed. R. Civ. P. 35(a). An order for a physical examination of a party is not granted as of right. Great W. Life Assurance Co. v. Levithan, 153 F.R.D. 74, 76 (E.D. Pa. 1994). Indeed, such an order is left to the sound discretion of the court. Id. While the movant may choose the physician to perform the examination, the movant does not have an absolute right to have the examination performed by a particular physician. See Great W. Life Assurance Co., 153 F.R.D. at 76; Stinchcomb v. United States, 132 F.R.D. 29, 30 (E.D. Pa. 1990); Liechty v. Terrill Trucking Co., 53 F.R.D. 590, 591 (D. Tenn. 1971). Nevertheless, unless the person to be examined has a valid

objection to movant's selected physician, said physician should perform the examination. Great W. Life Assurance Co., 153 F.R.D. at 76. Finally, a medical examination is appropriate only when the nonmovant's physical condition is in controversy. See Gawel v. Consolidated Rail Corp, CIV.A. No. 93-1758, 1993 WL 308273, at *1 (E.D. Pa. Aug. 5, 1993).

1. Barba's Motion to Compel

Barba seeks to compel a medical examination of Plaintiff upon certification that he and Plaintiff's counsel are unable to resolve the discovery dispute in question. Barba satisfied the procedural requirements for a Motion to Compel pursuant to Rule 35. As this is a "slip and fall" personal injury action, Plaintiff's physical condition is in controversy. Accordingly, good cause exists for having Plaintiff submit to a medical examination. The Court therefore grants Plaintiff's Motion to Compel pursuant to Rule 35.²

D. Legal Standard for Sanctions

Federal Rule of Civil Procedure 37 permits sanctions if a party fails to cooperate with discovery. Fed. R. Civ. P. 37. A monetary sanction should be commensurate with and likely to deter the type of violation at issue. See Swain v. City of Philadelphia,

² Barba originally proposed that Plaintiff be required to appear for a medical examination on September 22, 1999. Cognizant, however, that the date of this Order postdates September 22, 1999, the Court will order Plaintiff to submit to a medical examination not more than thirty days from the date of the Order accompanying this Memorandum and that said examination must comply with Federal Rule of Civil Procedure 35.

CIV.A. No. 98-4247, 1999 WL 236738, at *3 (E.D. Pa. April 21, 1999) (citing National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643, 96 S. Ct. 2778 (1976)). One purpose of sanctions is to provide parties with incentive to comply with a discovery order for the movant's inability during the allotted discovery period to obtain even basic information from a personal injury plaintiff is clearly prejudicial to a defendant in his or her attempt to defend against and obtain a prompt resolution of a lawsuit. See Adams v. Trustees, N.J. Brewery Trust Fund, 29 F.3d 863, 874 (3d Cir. 1999).

1. Barba's Motion for Sanctions

Barba alleges that Plaintiff failed to submit to a medical examination scheduled for August 7, 1999. Barba scheduled the appointment on July 7, 1999 and notified Plaintiff of this appointment that same day, thereby providing Plaintiff with several weeks notice of the examination. Barba seeks a sanction of \$150.00, the amount charged to Barba by the physician who was scheduled to examine Plaintiff on August 7, 1999.

Pursuant to the Court's Scheduling Order of April 23, 1999, discovery in this case closed on June 21, 1999. Thus, Barba complains of a single incident where Plaintiff failed to submit to a medical examination several weeks after the close of discovery. Moreover, before filing the instant Motion for Sanctions, Plaintiff did not fail to submit to a medical examination on a second occasion. See Swain, 1999 WL 236738, at *3 (explaining that movant

could have pursued rights more aggressively by seeking motion to compel or sanctions). Nor did Barba seek to have the Court compel Plaintiff to submit to a medical examination. Therefore, it is inappropriate to sanction Plaintiff for noncompliance with discovery. Had Barba been more aggressive in pursuing his rights and had Plaintiff repeatedly failed to fulfill his discovery obligations, a monetary sanction might have been appropriate. Nevertheless, the Court is not aware that such a circumstance exists in the instant matter. Accordingly, Barbra's Motion for Sanctions is denied.

An appropriate Order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY CHRISTIAN	:	CIVIL ACTION
	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	
	:	
v.	:	
	:	
PAUL I. BURMAN and JOSEPHINE	:	
BURMAN, his wife, SAUL ASSOCIATES	:	
& VINCENT BARBA	:	NO. 98-2045

O R D E R

AND NOW, this 8th day of November, 1999, upon consideration of Third-Party Defendant Vincent Barba's Motion to Dismiss the Joinder Complaint of Defendant, the United States of America, Pursuant to F.R.C.P. 12(b)(6) (Docket No. 13) and Defendant's response thereto, Third-Party Defendant Vincent Barba's unopposed Motion for Extension of the Discovery Deadline (Docket No. 15), and Third-Party Defendant Vincent Barba's unopposed Motion to Compel Defense Medical Examination of Plaintiff and for Sanctions (Docket No. 16) the Government's unopposed Motion for Leave to amend Third Party Complaint to Join Third Party (Docket No. 8), IT IS HEREBY ORDERED that:

(1) Third-Party Defendant Vincent Barba's Motion to Dismiss the Joinder Complaint of Defendant, the United States of America, Pursuant to F.R.C.P. 12(b)(6) is **DENIED**;

(2) Third-Party Defendant Vincent Barba's unopposed Motion for

Extension of the Discovery Deadline is **GRANTED**; and

(3) Third-Party Defendant Vincent Barba's unopposed Motion to Compel Defense Medical Examination of Plaintiff and for Sanctions (Docket No. 16) the Government's unopposed Motion for Leave to amend Third Party Complaint to Join Third Party is **GRANTED** as to compelling Plaintiff to submit to a medical examination and **DENIED** as to sanctions.

Additionally, IT IS HEREBY ORDERED that Plaintiff shall submit to a medical examination not later than thirty (30) days from the date of this Order and that such medical examination must comply with Federal Rule of Civil Procedure 35.

BY THE COURT:

HERBERT J. HUTTON, J.